Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-494

STATISTICAL TABULATING CORPORATION,
Petitioner,

v.

DAVID K. HAMISTER AND DAVID J. NORMANT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The petitioner Statistical Tabulating Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on July 11, 1979.

OPINION BELOW

The order of the Court of Appeals, no opinion having been written, appears in the Appendix hereto. The two opinions rendered by the District Court for the Northern Distict of Ohio appear in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 11, 1979. A timely petition for rehearing was denied on August 24, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the conveyance of title to a trade name and a computer program, without a reservation of rights, contain

an implied limitation that the purchaser can only use the property in the United States?

2. Can a trial court refuse to consider unrebutted evidence introduced at trial almost entirely without objection?

STATEMENT OF THE CASE

Respondents Hamister and Normant developed a computer program for inventory control and a trade name. In 1967 they entered into a three year agreement with petitioner under which they granted to petitioner an exclusive right to use the program and trade name within the United States. At the expiration of the agreement the program and trade name were to become the property of petitioner and respondents agreed to execute any and all documents necessary to transfer title to petitioner. The parties performed under the agreement.

Petitioner continued to use the program and trade name. In 1973 petitioner granted a license to a company to use the program in Canada. In 1975 petitioner granted a license to another company to use a revised version of the program in all areas of the world outside of the Americas.

In 1976 respondents filed suit, claiming they were the exclusive owners of the program and trade name outside the United States. The cause was removed to the United States District Court for the Northern District of Ohio on the basis of diversity of citizenship and amount in question.

The cause was tried to District Judge Robert B. Krupansky on a bifurcated basis. In an opinion filed December 10, 1976 the trial judge held that petitioner's rights to use the program and trade name were limited to the United States. The opinion does not discuss the question of title other than to state that petitioner claimed to be the owner with unlimited rights.

Thereafter trial on damages was held. Respondents introduced the two license agreements entered into by petitioner, the gross amounts received thereunder, and rested. Petitioner, through its treasurer, introduced evidence as to its direct and indirect costs incurred in entering into and performing under the license agreements. Respondents' only objection to the testimony was to items involving fixed overhead expenses. Respondents offered no rebuttal evidence. In an opinion filed April 4, 1977 the trial court described petitioner's evidence as uncertain, speculative and conjectural and entered judgment for respondents in the gross amount of the license agreements.

On appeal petitioner raised two principal issues not dealt with by the opinion of the trial court. First, can an express, unrestricted conveyance of title to personal property without reservation be construed as a license to use limited to the United States? Second, can a trial court reject unobjected to and unrebutted evidence of actual costs and award respondents a windfall profit? These issues were not addressed by the Court of Appeals, which simply affirmed for the reasons set forth in the opinions of the trial judge. Petitioner filed for a rehearing, directing the court's attention to the fact that it had failed to deal with the issues raised on appeal. The petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

1. THE FAILURE OF THE COURT OF APPEALS TO CONSIDER THE ISSUES RAISED ON APPEAL IS A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS CALLING FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION

Pursuant to 28 U.S.C. § 1291 Congress has granted parties a right of appeal from the final decision of a district court to a court of appeals. Inherent in the concept of an appeal is

that the reviewing court will consider the issues framed on appeal and rule thereon. Here the court of appeals completely failed to perform its function. Petitioner recognizes that the court dockets are crowded. Such congestion, however, is no justification for the failure that occurred here.

Two important issues were presented in this appeal. Had the court of appeals dealt with the issues presented, in order to affirm it had to hold that a conveyance of title may be limited without express reservations and that a trial court may arbitrarily reject the testimony of a witness whose testimony appears credible. Such a holding would be contrary to established law. Here the court of appeals made such holdings in effect by affirming the trial court. If the court of appeals meant to make such changes in established law an opinion should have been written.

The action of the court of appeals is such a departure from the accepted course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

2. THE DECISION BELOW RAISES A SIGNIFICANT QUESTION AS TO THE RIGHT OF A TRIAL JUDGE TO ARBITRARILY REJECT TESTIMONY

At the trial petitioner put its treasurer on the witness stand to testify as to the actual direct and indirect costs it incurred in entering into and performing under the license agreements. The witness testified at length about actual out of pocket expenditures as well as costs calculated on an estimated basis due to the necessity of estimating its costs for a particular project for salaried employees and equipment. Respondents never questioned that petitioner in fact had incurred costs and respondents did not object to the bulk of the testimony. Under these circumstances the testimony of the witness was extremely credible.

Without giving any factual justification, the trial court arbitrarily rejected the testimony and entered a judgment that gives the respondents a substantial wind-fall profit.

Rule 52(a) of the Federal Rules of Civil Procedure provides that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses". In this instance there was no conflicting evidence, no objection was made to the bulk of the testimony, and the testimony appeared credible. The Fifth Circuit has held that a trial court may not arbitrarily reject testimony under such circumstances. *Gee Chee* v. *Brownell*, 253 F. 2d 814, 817 (5th Cir. 1958). By affirming the trial court, the court of appeals in this instance has condoned such arbitrary conduct.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

77-3398

United States Court of Appeals

For the Sixth Circuit

DAVID K. HAMISTER, et al.
Plaintiffs-Appellees

vs.

STATISTICAL TABULATING CORP.,
Defendant-Appellant

ORDER

Before: EDWARDS, *Chief Judge*, PHILLIPS, *Senior Circuit Judge*, and BROWN,* *District Judge*.

On receipt and consideration of an appeal from a judgment awarding damages to plaintiffs in this breach of contract action filed under the diversity of jurisdiction of this court; and

On review of the contract at issue, the judgment of the District Court is in all respects affirmed for the reasons set forth in the opinions of District Judge Robert B. Krupansky, filed December 10, 1976 and April 4, 1977.

Entered by order of the Court

JOHN P. HEHMAN
Clerk

*Honorable Bailey Brown, Chief Judge, United States District Court for the Western District of Tennessee, sitting by designation.

APPENDIX B

The United States District Court

THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID K. HAMISTER, et al.,
Plaintiffs

v.

STATISTICAL TABULATING CORP.,
Defendant

KRUPANSKY, J.

CIVIL ACTION
NO. C76-735

MEMORANDUM AND ORDER

This action was instituted in the Court of Common Pleas, Cuyahoga County, Ohio. Upon defendant's petition this case was removed to the United States District Court for the Northern District of Ohio. Jurisdiction is invoked pursuant to 28 U.S.C. § 1332.

The Complaint alleges that on or about July 25, 1967, the plaintiffs and the defendant (STC) entered into a written contract under the terms of which plaintiff granted to defendant the exclusive right within the United States of America to use COINS, a unique computer oriented system for controlling distribution inventories including, but not limited to, retail and wholesale distribution, through the medium of data processing and its trade name and to provide services to customers employing COINS. Thereafter, on or about December 29, 1970, plaintiffs agreed in writing to certain modifications of their earlier agreements with defendant. Such agreements provided that defendant would continue to have the exclusive right to use COINS, all additions and changes to the system and other information to be disclosed by COINS to defendant and the trade name "COINS INVENTORY SERVICE" within the United

States of America. Said exclusive right to use COINS, all additions and changes to the system and other information to be disclosed by COINS to defendant and the trade name COINS INVENTORY SERVICE within the United States of America, would, at the termination of the attached agreements, be deemed to be the property of defendant.

Plaintiffs allege that defendant, in breach of the agreements, and in violation of plaintiffs' rights to COINS, has used and may still be using the COINS System and the trade name COINS in countries outside of the United States of America, and has sold or otherwise made the COINS System available to another party or parties, for use outside of the United States of America.

The cause came on for trial on October 28, 1976 and the issue of liability was submitted to the Court; the damage issue being reserved for subsequent determination.

The principal issue in this case is the extent of the rights granted defendant under the agreements of July 25, 1967 and December 29, 1970. Plaintiffs allege that the agreements convey only a limited right while defendant maintains that both agreements clearly provide that defendant will be the owner of the system with unlimited rights.

Paragraph 6 of the July 25, 1967 agreement provides that:

> During the term of this agreement COINS hereby grants to STC [defendant] the exclusive right within the United States of America to use the COINS system . . . At the expiration of the term of this agreement, STC shall continue to have said exclusive right to use the COINS System, the trade name "COINS INVENTORY SERVICE" and any and all information disclosed to it by COINS up to that time, and all of the foregoing items shall then be deemed to be the property of STC and COINS agreed to execute any and all documents necessary to transfer title of the COINS System, the trade name "COINS INVENTORY SERVICE" and any other information from itself to STC.

It is well settled that a writing is presumed to contain the entire agreement of the parties if the terms are clear and unambiguous.

In interpreting a written contract, the words used should be given their usual and ordinary meaning. *Carroll Weir Funeral Home* v. *Miller,* 2 Ohio St. 2d 189 (1965). It is clear to this Court that the usual and ordinary meaning of the words used in Paragraph 6 of the July 25, 1967 agreement limits defendant's use of the COINS System to "within the United States." It is also clear to this Court that, upon termination of the agreement, defendant is the owner of "said exclusive right" i.e. to use the COINS System within the United States.

Defendant, upon oral argument, directed the Court's attention to certain paragraphs of the agreement asserting that the general language therein expresses the intent of the parties and therefore should control. This assertion is untenable.

When the terms of a written agreement contain both general provisions and specific provisions relating to the same item, the specific provisions control. *Freeland* v. *Freeland,* 110 F.2d 966 (6th Cir. 1940); *See* also, *Hoke* v. *Marcus,* 127 N.E. 2d 54 (1955). Moreover, under Ohio law, general rules of contract construction are not invoked where the contract is clear and unambiguous. *Cincinnati Gas & Electric Company* v. *Westinghouse Electric Corp.,* 465 F.2d 1064 (6th Cir. 1972); *Pavlik* v. *Consolidation Coal Co.,* 456 F.2d 378 (6th Cir. 1972).

Accordingly, upon review of the record in its' entirety, including the agreements involved herein, the Court concludes that the totality of defendant's rights to use the COINS System was and is limited to the territory within the United States.

IT IS SO ORDERED.

Robert B. Krupansky

United States District Judge

United States Court of Appeals

THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID K. HAMISTER, et al.,
Plaintiffs

v.

STATISTICAL TABULATING CORP.,
Defendant

KRUPANSKY, J.

CIVIL ACTION
NO. C76-735

MEMORANDUM, OPINION AND ORDER

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The Complaint alleged that on or about July 25, 1967, the plaintiffs and the defendant (STC) entered into a written contract under the terms of which plaintiff granted to defendant the exclusive right within the United States of America to use COINS, a unique computer oriented system for controlling distribution inventories including but not limited to, retail and wholesale distribution, through the medium of data processing and its trade name and to provide services to customers employing COINS. Thereafter, on or about December 29, 1970, plaintiffs agreed in writing to certain modifications of their earlier agreements with defendant. Such agreements provided that defendant would continue to have the exclusive right to use COINS, all additions and changes to the system and other information to be disclosed by COINS to defendant and the trade

name "COINS INVENTORY SERVICE" within the United States of America. Said exclusive right to use COINS, all additions and changes to the system and other information to be disclosed by COINS to defendant and the trade name COINS INVENTORY SERVICE within the United States of America, would, at the termination of the attached agreements, be deemed to be the property of defendant.

Plaintiffs alleged that defendant, in breach of the agreements, and in violation of plaintiffs' right to COINS, has used and may still be using the COINS System and the trade name COINS in countries outside of the United States of America, and has sold or otherwise made the COINS System available to another party or parties, for use outside of the United States of America.

The cause came on for trial on October 28, 1976 and the issue of liability was submitted to the Court; the damage issue being reserved for subsequent determination.

This Court's Order of December 10, 1976 found that the totality of defendant's rights to use the COINS System was and is limited to the territory within the United States.

It has been admitted that the defendant entered into written licensing agreements with Orenda, Ltd. of Toronto, Canada and Clark International Marketing S.A. (Clark International) under which the licensee is licensed to use the COINS System in certain limited areas outside the United States. (Defendant's Proposed Findings of Fact and Conclusions of Law filed on October 26, 1976).

Plaintiff had submitted a Motion In Limine seeking to prevent defendant from introducing any evidence of overhead expenses whether they were incurred in the development, administration or sale of the COINS System (general overhead expenses) or whether they would have been in-

curred regardless of whether the two licenses outside the United States had been granted, *i.e.* (fixed overhead expenses). Defendant responded in opposition to plaintiff's motion.

The Court reserved ruling on the Motion in Limine and permitted defendant great latitude in presenting its evidence. Trial on the damage issue was concluded on March 10, 1977.

Plaintiffs offered evidence in the form of exhibits to prove the amounts received by defendants from those transactions which resulted in the breach of the agreement between plaintiffs and defendant herein. Specifically, plaintiffs' Exhibit I conclusively establishes that defendant received a one-time, lump sum payment of $60,000 from Clark International in payment for the licensing agreement between Clark International and defendant herein which grants Clark International the right to use the COINS System in certain areas outside the United States of America.

Plaintiffs also introduced defendant's amended Exhibit 3 which reflects that defendant has, as of February 1977, pursuant to its agreement with Orenda Ltd., received a total amount of $8,443.75.

At the close of plaintiff's evidence, plaintiffs moved for Summary Judgment seeking the gross revenues received by defendant plus interest, an injunction enjoining defendant from any further sales of the COINS System outside the United States, and punitive damages for the conversion effected in obvious reckless disregard of the contract. The Court overruled plaintiffs' Motion and allowed defendant to present its evidence.

Prior to the presentation of defendant's evidence the parties entered into a stipulation on the record providing that defendant will not initiate a renewal of Orenda's contract but, if Orenda requests a renewal (as provided for in the

STC-Orenda agreement) defendant may renew for one year. It was further stipulated that any funds received pursuant to such renewal shall be paid into an escrow fund to be divided among the parties herein in the same percentage as the Court determines in the instant action.

Defendant sought to introduce evidence of costs and expenses to be deducted from the gross revenues through the testimony of William J. Dalton, Jr. Dalton testified that he has been the Vice-President of Administration and Treasurer of Statistical Tabulating Corporation for nine and one-half years.

On direct examination, Dalton testified as to certain costs and expenses which he had circulated to be directly attributable to performing the contracts with Clark International and Orenda Ltd. On cross-examination, however, it became apparent to this Court that Dalton's testimony was solely based upon "estimates of my best recollections of what was involved." Furthermore, upon questioning by the Court, Dalton was unable to distinguish "actual costs" and "standard costs", terms which were used frequently throughout his testimony on both direct and cross-examination. Moreover, when asked on cross examination what actual costs were paid by STC in connection with the performance of these contracts, Dalton answered that the "company actually paid people [employees] as do all companies." The incompetence of the witness was further demonstrated when, in reply to the question seeking to discover upon what basis the costs attributed to computer time were founded, he replied that he did not know what his company's actual cost would be. Instead, he testified, that he based his calculations on "what it would cost me to go across the street and rent a computer."

Upon the totality of evidence received, the Court is constrained to conclude that plaintiffs' Motion in Limine has been mooted by defendant's failure to introduce any competent evidence of any costs or expenses.

It is elementary that in an action for breach of contract, after the plaintiff has made a showing of substantial damages, the burden is on the defendant to offer evidence in mitigation of such damages. *Carpenter* v. *Warner*, 38 Ohio St. 416 (1882). It is fundamental that evidence which is uncertain and speculative, and conjectural is incompetent.

Plaintiffs have made a complete showing of damages and defendant sought to rebut that evidence with testimony admittedly based wholly on conjecture. Thus, the Court hereby awards plaintiffs $60,000 representing the revenues received by defendant pursuant to the Clark International transaction and $8,443.75 plus any other amounts which may be received by defendant or which have already been received after February, 1977 (the date of the last entry on defendant's amended Exhibit 3) pursuant to the Orenda Ltd., transaction together with interest, to be calculated at 6% per annum from the dates of the defendant's receipt of the revenues from each transaction.

Finally the Court notes that it is well-settled under Ohio law that punitive damages may be awarded upon plaintiff's proof of fraud, malice, intentional or other outrageous conduct. *Lake Shore & M.S.R. Co.* v. *Hutchins*, 37 Ohio St. 282 (1881). However, as a general rule, damages for breach of contract are limited to the pecuniary loss sustained, and punitive damages are not recoverable. *Battista* v. *Lebanon Trotting Association*, 538 F.2d 111 (6th Cir. 1976); *Ketcham* v. *Miller*, 104 Ohio St. 372 (1922); *Schell* v. *Kaiser-Frazer Sales Corp.*, 28 Ohio App. 2d 16 (1971). Thus, plaintiffs' prayer for punitive damages is hereby denied.

Accordingly, judgment shall be entered by the clerk in accordance with the above.

IT IS SO ORDERED.

Robert B. Krupansky

United States District Judge